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No. 80-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VALLEY FORGE CHRISTIAN COLLEGE, *Petitioner,*

v.

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL.

and

THE UNITED STATES DEPARTMENT OF EDUCATION, THE UNITED STATES OF AMERICA, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENTS AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL.

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QUESTION PRESENTED

Whether the Court of Appeals misinterpreted the law of standing when it granted standing to Respondents to challenge, under the Establishment Clause of the First Amendment, Government transfer to a pervasively sectarian Bible College of property worth more than one million dollars.

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STATEMENT OF THE CASE

Northeast Bible College, now known as Valley Forge Christian College, describes itself as a theological or divinity school the *primary* purpose of which "is to train leaders for church related ministries." J.A. 64, 69, and 102. The Court of Appeals characterized it as "admittedly sectarian." *Americans United* v. *United States Department of HEW*, 619 F.2d 252, 253 (1980). The Bible College is operated by a religious denomination — the Assemblies of God — "for the training of pastors, evangelists, missionaries, Christian education and lay workers." J.A. 64.

The Bible College's president, the Rev. Obie L. Harrup, Sr., in the school Bulletin notes that "God and our country has [*sic*] given us one of the finest college facilities in the United States. . . ." The Rev. Harrup notes that students "sit under [Holy] Spirit filled teachers who are qualified academically and spiritually to teach . . . God's word." He further states that the "Spirit is present in both classroom and chapel to give guidance and help towards a God-centered life. From such a student body as ours, ministers, missionaries, and Christian workers go to the ends of the earth to fulfill the Great Commission." J.A. 63. The Great Commission of Jesus is recorded in Matthew 28:19 20: "Go ye therefore, and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost: Teaching them to observe all things whatsoever I have commanded you: and, lo, I am with you alway, *even* unto the end of the world."

Admission requirements stress that since the Bible College "is basically . . . for training those who expect to enter some form of Christian service, the motivation of the prospective student is of prime importance." J.A. 89. "Resident students must have a born again experience and be of good moral character. Those who have not experienced the Baptism in the Holy Spirit will be encouraged to seek and receive this experience." J.A. 89.

The application blank for the Bible College asks such questions as the following in a category labeled "Christian Experience and Objectives": "When and where were you converted?" "Have you backslidden since being converted?" "Have you been baptized in the Holy Spirit according to Acts 2:4?" The application section entitled "Supplementary Statement" asks such ques-

tions as these: "Do you believe God has called you to a definite Christian work?" "When and under what circumstances did you first know definitely that you were called by God to this ministry? (For example, did your call come through immediate awareness, by means of a portion of scripture, through someone's word of counsel or exhortation, in a service in which others were consecrating themselves to the Lord, or by other means?)" J.A. 138-41.

The application blank asks prospective students to supply the church, name, and address of three references, including one "pastor" and two "Christian leaders." J.A. 140. The reference sheets that the pastor and Christian leaders fill out include evaluation of the prospective student's "Christian life." They ask such questions as "Do you believe the applicant is a commited [*sic*] Christian?" "Do you consider applicant emotionally qualified for full-time Christian service?" "In what form of Christian work has applicant engaged and with what success?" J.A. 142-44.

All entering students must take a "Bible content" test "to help guide counselors and teachers." J.A. 90.

The Bulletin of the Bible College outlines a dozen "fundamental truths believed and taught" at the school. They include statements concerning the Bible as the Word of God; the nature of the Godhead; the nature of Christ and His ministry; justification by faith in Jesus Christ; the work of the Holy Spirit; holiness; faith healing; the imminent return of Christ; and, finally, " 'They which are written in the Lamb's Book of Life' shall enter into the holy city. . . . But 'whosoever was not found written in the book of Life was cast into the lake of fire.'" J.A. 67-68.

Students must attend daily chapel services, which the Bulletin describes as the "highlight of the daily progam." J.A. 71. The Bulletin continues: "The spiritual tone of the college is maintained as students meet God in worship and enjoy the anointed ministry of the Word. . . . As the Holy Spirit moves upon these services, ample time is made in the schedule for waiting on the Lord. Attendance is required." J.A. 71.

A "dominant" feature of the Bible College's program is its Christian Service program, in which each student must participate each term. J.A. 71 and 95. Each student must complete before graduation at least 35 Christian Service assignments in a "variety of ministries, selected by the Director of Christian Service in keeping with the individual student's needs, aspirations and chosen field of ministry. Experiences may be . . . in the areas of Bible clubs, canvassing, street meetings, junior churches, young peoples meetings, teaching in Sunday Schools, services in jails and old folks homes, and in song leading and preaching in church services." J.A. 71 and 95. The Bulletin notes that through this required ministry "each year many souls find Christ as Savior." J.A. 95.

In addition, the "entire student body is organized into 'The Student Missionary Society,'" student leaders of which present "special missionary prayers" and the needs of Assemblies of God missions. "Each Friday the Society conducts a missionary service" at which students are challenged "with the urgency of world evangelism. It is in such services that the calling of God to the harvest becomes definite to many students." J.A. 71-72. Also, one of the highlights of the school year is the annual missionary convention, where missionaries on furlough give students first-hand information about mission work. J.A. 72.

The Bible College also advises students to "counsel with the president prior to engagement and receive his permission." J.A. 72. They are warned that "[d]eparture from the school's standards will result in Christian counseling and when necessary, appropriate discipline will be administered in the hope of helping the student develop a mature Christian character." J.A. 73. Women students are exhorted to "wear modest clothing, reflecting Christian character." J.A. 75. The Bulletin describes the library as "especially adapted to a Bible college curriculum." J.A. 74. The bookstore stocks Bibles and religious books. J.A. 85.

The school follows policies established by the Department of Education of the Assemblies of God. J.A. 79. Tuition is discounted 10% for the wives and children of pastors and full-time evangelists, 25% for ordained ministers, and 50% for Assemblies of God foreign missionaries and their children. J.A. 84. The Bible College welcomes donors who wish to establish scholarships as investments "in the training of future workers for God." J.A. 85.

The Bible College has three kinds of four-year programs: (1) Ministerial, "especially prepared for those . . . who wish to prepare . . . for pastoral or evangelistic ministries"; (2) Missionary, "especially developed for those . . . who wish to prepare . . . for home and missionary ministries"; and (3) Christian Education, "especially designed for those . . . who wish to enter the teaching ministries of the Church." J.A. 102.

The four three-year certificate programs are (1) an abbreviated Ministerial program concentrating on "pastoral aspects of ministry"; (2) a shortened Missionary program providing "basic skills for . . . missionary service"; (3) a limited Christian Education pro-

gram providing "basic teaching methodology for ministries within a local church"; and (4) a Bible Concentration program "designed to give the student a thorough and practical knowledge of the Bible." J.A. 102.

The final curriculum offering is a one-year certificate program "developed primarily for those . . . who desire personal enrichment in Bible and Theology" and described as being "especially beneficial for Sunday School teachers, Bible study group leaders, Youth group leaders and other[s] . . . in local church leadership positions." J.A. 102.

Course descriptions are divided into three divisions. J.A. 118-25. The Division of Bible and Theology includes subdivisions in Old and New Testament studies and Theology. J.A. 118-19. The Division of Professional Studies includes subdivisions in Ministerial, Missionary, and Christian Education. J.A. 119-22. The Ministerial subdivision includes such courses as Personal Evangelism, Hermeneutics, and Homiletics. J.A. 119-20. The Missionary subdivision includes such courses as Home Missions and History of Missions. J.A. 120-21. The Christian Education subdivision includes such courses as Child Evangelism and Christian Education of Children ("with the purpose of developing a properly organized educational program for the children's departments of the Sunday School"). J.A. 121-22. The Division of General Education has eight subdivisions, including Languages (including Deaf Ministries I and II and Biblical Hebrew and Greek), Music (including courses concentrating on "church music and congregational song leading techniques," "congregational singing," and "the needs of the future church or school choir director"). Organ lessons "consist primarily of

studying sacred music." Piano lessons include study of hymn arrangements. J.A. 122-24. In the Physical Science subdivision, Survey of Physical Sciences presents physics, chemistry, astronomy, and geology from the "Christian view of the world in the light of scientific discovery." J.A. 124. In the Social Sciences subdivision, Social Problems studies the "role of the Christian worker in finding a solution" to "crime, delinquency, broken homes, urbanization, [and] minority groups." Introduction to Philosophy stresses "the Christian frame of reference." J.A. 124-25.

Membership in the honor society, "Delta Epsilon Chi (approved in Christ-Romans 16:10)" depends in part on "Christian character." J.A. 95.

Graduation requirements include "[s]oundness in doctrine," "[a]cceptible [*sic*] deportment and regular attendance in chapel," and "[e]vidence of development and dependability in Christian Service," specifically the fulfillment of at least 35 Christian Service requirements. J.A. 96. The Bulletin notes that graduates "will be able to enjoy a sensitivity to the ministry of the Holy Spirit so that both the fruits and gifts of the Spirit may be manifested through them in an outreach to the lost and in the edification of believers." J.A. 66.

The Bible College requires its faculty "to have been baptized in the Holy Spirit and be living consistent Christian lives." J.A. 37. Prospective faculty are asked their religious affiliation. J.A. 27 and 38. Twelve of the sixteen regular faculty members (75%) are — or were — pastors, assistant pastors, co-pastors, evangelists, or missionaries. J.A. 127-28. All members of the administration of the Bible College must be affiliated with the Assemblies of God. J.A. 36. Of the 35 members of the school's Board of Regents, all of whom are affiliated

with the Assemblies of God, 27 (77%) are pastors. J.A. 34-35. The Board consists of four members from each participating district of the Assemblies of God. J.A. 35. The Executive Director of the Department of Education of the Assemblies of God is a member of the Board by virtue of office. J.A. 35-36. Approximately 75% (376) of the 501 students enrolled in 1977-78 were affiliated with the Assemblies of God. J.A. 47-60.

The federal Department of Health, Education and Welfare (HEW) in August 1976 conveyed to the Bible College 77 acres of surplus government property located in Valley Forge, Pennsylvania, including all buildings, fixtures, and equipment situated on the land. The transfer was made pursuant to the Federal Property and Administrative Services Act of 1949, which authorizes HEW to sell surplus property for tax-exempt, educational and health purposes. 619 F.2d at 253.

The Act requires the Secretary of HEW to consider benefits that may accrue to the United States from the new use of the property and to grant discounts — "public benefit allowances" — to the transferees, in this case to the Bible College. In exchange for the Bible College's agreement to use the property for specified educational purposes for 30 years, HEW granted the school a 100% public benefit allowance. Thus the Bible College received title to the property without making any financial payment. The property — representing a government investment of $10,374,386. — had a fair value at time of its transfer to the Bible College of $1,303,730. *Ibid.*

Respondents Americans United for Separation of Church and State, Inc., a nonprofit, tax-exempt organization with a claimed membership of 90,000, and four of its individual directors — all citizens and taxpayers of

the United States — challenged the property transfer to the Bible College. Americans United, which defends, maintains, and promotes religious liberty and the principle of separation of church and state, and the taxpayers-citizens claimed the property transfer violated their rights as protected by the Establishment Clause of the First Amendment. They sought declaratory and injunctive relief to void the transfer. *Ibid.*

The District Court dismissed the suit on the ground Americans United and the individual plaintiffs lacked standing as taxpayers to challenge the property under the Federal Property and Administrative Services Act. *Ibid.* The Court of Appeals reversed and remanded, concluding: "The constitutional 'injury in fact' complained of by the plaintiffs here gives them a sufficient 'personal stake in the outcome' to assure a complete perspective of the issues involved. And we are convinced that the interest which the plaintiffs assert and seek to safeguard here is within the zone of interests protected by the Establishment Clause." *Id.* at 266.

Valley Forge Christian College petitioned this Court for a writ of certiorari, which was granted on February 23, 1981. J.A. 193.

SUMMARY OF ARGUMENT

The Bible College and the Government seek by attempting to apply formalistic standing rules, no longer even rigidly adhered to by this Court, to prevent Respondents from litigating their rights as guaranteed by the Establishment Clause of the First Amendment.

Respondents here challenge the decision to sell property to a pervasively sectarian institution without receiving in return either money or a constitutionally permissible public benefit.

The property was transferred by the Department of Health, Education and Welfare (HEW) to the Bible College by authority of the Federal Property and Administrative Services Act, which Congress enacted under the authority of Article IV, Section 3, Clause 2, of the Constitution, which empowers Congress to dispose of and make needful rules and regulations concerning federal property. The Act authorizes the Administrator of General Services to dispose of surplus property and permits the Administrator to assign to HEW real and personal property for educational and public health uses.

In fixing the value of surplus property to be transferred to an institution, the Act instructs HEW to consider any benefit which has accrued or may accrue to the United States. But the Act contains no prohibition against granting a public benefit allowance to a pervasively sectarian institution and fails also to prohibit use of the property for religious purposes.

When HEW sold the property to the Bible College, the property had a fair-market value of $1,307,730. However, the Government granted the Bible College a 100% public benefit allowance in return for the pervasively sectarian Bible College's training of ministers, missionaries, and other church workers.

Respondents claim that this transaction violated the Establishment Clause of the First Amendment.

Respondent Americans United claims standing on behalf of its citizen-taxpayer members. The four individual Respondents claim standing both as federal taxpayers and United States citizens.

Respondents meet both the constitutional and prudential standing requirements enunciated in this Court's most recent decisions on standing. Respondents person-

ally have suffered an actual injury as a result of the unconstitutional conduct of the Government.

Respondents additionally have standing as persons adversely affected or aggrieved under the Administrative Procedures Act because of HEW's failure to obtain constitutionally sufficient consideration for the sale of the property.

There is no logical distinction, as far as case presentation and the ability of a court to resolve an issue are concerned, between a plaintiff contesting the donation of money or the grant of surplus, but valuable, property. Prudential and constitutional considerations mandate that the courts, and not voters or lawmakers, determine the specific factual and constitutional issues raised in this case.

Respondents not only have standing to litigate the Establishment Clause issue, but they uniquely possess those attributes most vital to such litigation.

ARGUMENT

I. THE GOVERNMENT TRANSFERRED SURPLUS PROPERTY TO A PERVASIVELY SECTARIAN BIBLE COLLEGE IN EXCHANGE FOR A PUBLIC BENEFIT — THE TRAINING OF MINISTERS, MISSIONARIES, AND OTHER RELIGIOUS WORKERS — WHICH IS FORBIDDEN BY THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

The Government and the Bible College seek to have this Court apply rigid and formalistic standing rules to prohibit Respondents' claim that the Government's transfer of surplus property to the Bible College violates the rights of Respondents as guaranteed by the Establishment Clause of the First Amendment.

The effect of Petitioners' strategy would remove from judicial scrutiny a substantial portion of constitu-

tional abuses and would thus divide the Establishment Clause into enforceable and non-enforceable rights. The practical result would be the tacit condoning of governmental conduct which, except for an overly restrictive interpretation of the law of standing, would be struck down as a violation of the Establishment Clause.

The Government apparently believes that it has discovered a method by which it may funnel millions of dollars worth of valuable property to pervasively sectarian institutions with no one having standing to object. And Petitioner in its Petition for Certiorari boldly asserted that "[u]ntil this lawsuit, the Federal Property Act had never been challenged in its 31-year history; none of the hundreds and hundreds of surplus transfers to health and educational institutions (including those which were church-related) had ever been questioned." Petition at 8-9. The Court of Appeals noted that "[s]ince the enactment of this Act, HEW has authorized more than 650 transfers of surplus government property to various religious institutions. The total fair market value of government property transferred to denominationally-sponsored organizations during this period amounted to more than $25,700,000.00." 619 F.2d at 254. The government sale of public property here attacked represents one of the largest surplus property transfers to a religious institution. Joint Appendix filed with Court of Appeals at 202-227.

Respondents do not here attack those previously consummated transfers. Clearly those transfers would depend on the specifics of each case and are not the subject of this litigation.

Contrary to the Government's assertion that Respondents here challenge the decision of a governmental agency to sell a parcel of surplus property, Govern-

ment's Brief on Merits at 15, their challenge is to the Government's sale of the property to a pervasively sectarian institution without receiving in return full and fair consideration, cash or kind, or a constitutionally permissible public benefit.[1]

Respondents do not challenge the Government's decision to declare the property surplus and to sell it. Nor do Respondents object to the procedures followed to locate a purchaser. If the Bible College had paid adequate consideration based upon the determined sale price of $1,307,730, there would be no case or controversy between the parties to this action.

Article IV, Section 3, Clause 2, of the Constitution in pertinent part provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." Thus, this case clearly deals with the exercise of congressional power, though that power may have been delegated to the executive branch.

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[1] The Statement of the Case has set out in some detail the substantive facts of this case because this Court in *Flast* v. *Cohen*, 392 U.S. 83 (1968), pointed out that it is appropriate to examine the substantive issues involved to "determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.* at 102. Standing can be discussed meaningfully only in the context of the precise contention of the parties. One commentator has suggested that standing should not be treated as a threshold issue, but rather should be viewed as a component of plaintiff's claim for relief since its resolution necessarily involves substantive issues such as injury, duty, and causation. See L. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 Yale L.J. 425, 426-27 (1974).

Pursuant to Article IV, Section 3, Clause 2, of the Constitution, Congress enacted the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§471 *et seq.*, which, according to the Act, was meant to provide an "economical and efficient system for . . . the disposal of surplus property." Congress was clearly sensitive to the worth of excess property and wished to guard against the loss of the value of any such surplus property. 40 U.S.C. §483(a)(1).

In dealing with surplus property, Congress carefully prescribed how the property would be disposed of, generally insuring that the government would obtain fair consideration from the transferee in return for the property disposed of. 40 U.S.C. §484. Under certain circumstances the Act even required the Administrator of General Services to advertise for bids in a manner and by methods calculated to provide for "full and free competition which is consistent with the value and nature of the property involved." 40 U.S.C. §484(e). Congress even demanded that no funds be used by any department or agency in any branch of government if the furniture requested could be met "by transfer of excess furniture including rehabilitated furniture from other departments and agencies." 40 U.S.C. §483(b).

The Act, however, provides that the administrator in his discretion may assign to HEW, (now Department of Education) for disposal "surplus real property, including buildings, fixtures, and equipment situated thereon, as is recommended by the Secretary of the Department of Health, Education and Welfare as being needed for school, classroom, or other educational use, or for use in the protection of public health, including research." 40 U.S.C. §484(k). Congress imposed no bid requirements on HEW for surplus property disposed of under this provision.

In fixing the sale or lease value of surplus property, the Act instructs the Secretary of HEW to consider "any benefit which accrued or may accrue to the United States from the use of such property by any . . . institution." 40 U.S.C. §484(k)(1)(C). But Congress failed to place into the Act any prohibition against the granting of a public-benefit allowance to a pervasively sectarian institution. Likewise the Act fails to prohibit the transfer of property to be used for religious exercises or purposes. *See Tilton* v. *Richardson,* 403 U.S. 672 (1971), in which this Court held that it could not be assumed that a substantial structure had no value after 20 years and hence the unrestricted use of a valuable property in effect is an unconstitutional contribution of some value to a religious body if at the end of 20 years the building is converted into a chapel or otherwise used to promote religious interests. Respondents argue that without a prohibition against pervasively sectarian use, the Federal Property and Administrative Services Act, as applied to the facts of this case, becomes the vehicle by which the Government, exercising the powers delegated by Congress, has breached the Establishment Clause.

Under Section 485(a) of the Act, all proceeds "from any sale, lease or other disposition shall be covered into the Treasury as miscellaneous receipts . . . ." Thus, the Act reveals a congressional attempt to prevent a drain of the public treasury by demanding the recovery of the full value of all surplus property disposed of. Even property transferred to an educational institution was to be transferred for value received, the consideration to be either monetary or an allowance for some public benefit.

In this case tax funds clearly were used to acquire the property in question. Since 1942 the federal government spent approximately $10,374,386 of tax moneys to

improve and furnish the subject property. HEW determined that the fair market value of this property at the time of the transfer was $1,307,730. 619 F.2d at 253. The Bible College apparently agreed with the government that the real estate transferred had a fair market value of $577,500 as set out in the deed of transfer. J.A. 177. The Bible College also agreed by executing the bill of sale that the personal property involved in the transfer had an additional fair market value of $730,230. Joint Appendix filed with Court of Appeals at 276. For all of this the Bible College paid not even one cent to the government. And the Government insists this transfer was not an outright gift to a pervasively sectarian college.

To avoid the holding of *Flast* v. *Cohen*, 392 U.S. 83 (1968), the Government says: "They [Respondents] object only to the identity of the purchaser with whom the government contracted after the useful life of the property was exhausted." Government's Brief on Merits at 15. The Government is far off the mark. First, Respondents do not object to the sale per se. Second, although the Government might have had no further use for the property, the useful life of the property was not exhausted. And third, Respondents do not object to the identity of the purchaser. Respondents do object because either the transaction was a sham and in truth the Government made a donation to a pervasively sectarian Bible College or, and worse in Respondents' judgment, the contract multiplied the Establishment-Clause violation. The Bible College agreed to pay for the property through a public benefit that would accrue from the use of the property by the Bible College. But what is the public benefit the Government is to receive? That benefit, basically, consists of the training of ministers, missionaries, and others engaged in various ministries of

a church. It is an educational program designed only for those who agree to attend chapel and to accept thirty-five (35) Christian Service assignments. It is an educational program from which graduation is dependent upon demonstrating that the student evidences soundness in church doctrines.

To be sure, as alleged by the Government, there are some restrictions in the instruments of transfer. Government's Brief on Merits at 8. The Bible College is forbidden to sell or encumber the land except under stated circumstances and is required to comply with applicable civil rights legislation, though it may, and does, discriminate on the basis of religion. But, none of the restrictions relate in any way to the use of the facilities for pervasively sectarian education or to its religion-based admissions and graduation requirements. Thus, what the Government contracted to receive for the benefit of the Nation, in lieu of cash to be deposited in the United States Treasury, was pervasively sectarian education.

Here the aid to the Bible College was neither indirect nor incidental. More than $1.3 million worth of government property purchased at taxpayers' expense was transferred to a church-operated, pervasively sectarian Bible College. The grant even included a chapel which the College immediately used for religious services. Respondents contend that the grant to, or purchase of, pervasively sectarian education was not the type of permissible aid to education found in *Hunt* v. *McNair,* 413 U.S. 734 (1973), and *Tilton* v. *Richardson, supra.* Rather this aid is to a self-proclaimed theological school with an evangelical and proselytizing mission. This grant has the primary effect of advancing religion. *Meek* v. *Pittenger,* 421 U.S. 349, 366 (1975).

The College has no misunderstanding of how it obtained this bonanza. "God and our country has given us one of the finest college facilities in the United States," writes the Rev. Obie L. Harrup, Sr., president of the Bible College, in the College Bulletin. He continues: "As a student at Valley Forge Christian College you will sit under Spirit filled teachers who are qualified academically and spiritually to teach you God's word." In the next paragraph the president adds: "The Holy Spirit is present in both classroom and chapel to give guidance and help towards a God-centered life. From such a student body as ours, ministers, missionaries, and Christian Workers go to the ends of the earth to fulfill the Great Commission." The president does speak of various secular fields. He states: "Today, men and women who have already prepared for and labored in various secular fields, are feeling God's call to the ministry." J.A. 63.

The three main evils against which the Establishment Clause was intended to protect are "sponsorship, financial support, and active involvement of the sovereign in religious activities." *Lemon* v. *Kurtzman,* 403 U.S. 602, 612 (1971). This Court also has spoken out against the placement of the Government's power, prestige, and financial support behind a particular religion, *Engel* v. *Vitale,* 370 U.S. 421, 429-30 (1962), and "active involvement of the sovereign in religious activities." *School District of Abington Township* v. *Schempp,* 374 U.S. 203, 222 (1963).

This Court in *Schempp* stated that "[t]he vice of all such arrangements [all improper forms of church-state relationships] under the Establishment Clause is that the state is lending its assistance to a church's efforts to gain and keep adherents." *Id.* at 222. That "vice" is present in this case.

This Court also has held that "the Establishment Clause is not limited to precluding the State itself from conducting religious exercises. It also forbids the State to employ facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone." *Id.* at 229 (Mr. Justice Douglas concurring).

Also this Court has instructed that the history which its prior decisions "have summoned to aid interpretation of the Establishment Clause permits little doubt that its prohibition was designed comprehensively to prevent those official involvements of religion which tend to foster or discourage religious worship or belief." *Id.* at 234 (Mr. Justice Brennan concurring). The transfer in this case fosters the religious-education ministry of the Assemblies of God Church.

In his concurring opinion in *McCollum* v. *Board of Education,* 333 U.S. 203 (1948), Mr. Justice Frankfurter said: "We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.' . . . We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.'"

II. RESPONDENT AMERICANS UNITED AND THE INDIVIDUAL RESPONDENTS MEET THE CONSTITUTIONAL AND PRUDENTIAL REQUIREMENTS FOR STANDING AS ENUNCIATED BY THIS COURT.

Respondents claim to have standing both in their capacity as taxpayers and also as citizens to challenge on Establishment Clause grounds the Government transfer to the Bible College.

For example, Andrew Leigh Gunn, one of the individual Respondents, testified this way:

> Q. Will you tell me . . . how your payment of taxes . . . is in any way affected by the transfer of this property . . .?
>
> A. Well, the property was paid for at one time by public taxes, through the taxing powers of the Federal Government, and as a taxpayer I have a certain share in that land, and so my financial interests were affected through my taxes, and also my rights as a citizen were being violated in my judgment through the First Amendment of the Constitution, which maintains separation of church and state and religious liberty . . . so my financial interest and my rights as a citizen were being violated.

Gunn Deposition at 10. Another individual Respondent, Mallary Binns, testified this way:

> Q. Upon what did you base your decision to become a named plaintiff in this lawsuit?
>
> A. It is twofold. . . . One, the violation of the no establishment clause in the First Amendment, where you have Government valued property being given to a religious institution, and as a taxpayer. This Government property of value, of which I have a vested interest as a taypayer and as a citizen, being given to a religious institution. So it is a twofold concern.

Binns Deposition at 14-15.

The question of standing to sue determines whether plaintiffs are entitled to have a court decide the merits of a dispute. This inquiry involves both constitutional limitations under Article III and prudential concerns. In both dimensions standing concerns the proper, and properly limited, role of courts in our democratic society.

Warth v. *Seldin*, 422 U.S. 490, 498 (1975); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), 99 S.Ct. 1601, 1607-08.

A. Respondents Suffered An Actual Injury To Their Right To Be Free From Religious Establishment When The Government Transferred The Property To The Bible College In Return For Impermissible Consideration.

This Court has stated that in order for a litigant to satisfy the Article III constitutional requirements of making out a case or controversy, "the plaintiff must show that he personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood, supra* at 1608.

In *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980), 100 S.Ct. 1202, 1208, this Court noted that the case or controversy limitation serves two complementary purposes: (1) "It limits the business of the federal courts to 'questions presented in an adversary context and in a forum historically viewed as capable of resolution through the judicial process' " and (2) "[I]t defines the 'role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.' "

Clearly this Court has rejected the wooden logic inherent in the formalistic view presented by the Petitioner and the Government. Both ignore the teachings of this Court on the doctrine of standing. Both the Government and the Bible College contend that Respondents do not meet a "personal stake" requirement required by Article III.

This Court, however, in *Geraghty, supra* at 1212, recently stated that "[t]he purpose of the 'personal stake' requirement is to assure that the case is in a form capable of judicial resolution. The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions."

The loosening of the constitutional requirements for standing is demonstrated by this Court's instructive footnote in *Geraghty, supra* at 1212-13, n. 11: "We concede that the prior cases may be said to be somewhat confusing, and that some, perhaps, are irreconcilable with others. Our point is that the strict, formalistic view of Art. III jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions. And, in creating each exception, the Court has looked to practicalities and prudential considerations. The resulting doctrine can be characterized, aptly, as 'flexible'; it has been developed, not irresponsibly, but 'with some care' . . . ."

To paraphrase the words of this Court in *Geraghty*, this case does not approach the extreme feared by the Government. These plaintiffs "suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury will satisfy the formalistic personal stake requirement. . . ." *Id.* at 1213, n. 11.

As the Court of Appeals in this case observed, standing is not riveted to economic issues. Aesthetic, conservational, and recreational values may satisfy the injury-in-fact requirement. 619 F.2d at 257.

In *Village of Arlington Heights* v. *Metropolitan Housing Authority*, 429 U.S. 252, 262-63 (1977), this

Court noted: "It has long been clear that economic injury is not the only kind of injury that can support a plaintiff's standing." In *Association of Data Processing Services Organizations* v. *Camp*, 397 U.S. 150, 154 (1970), this Court also explained that "a person . . . may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause." Similarly, the Court of Appeals in this case held that Respondents' claim is that "the challenged transfer of government property to a religious institution injures their individual and personal constitutional right of religious liberty and separation of church and state." 619 F.2d at 265.

This Court also has observed a distinction between the Establishment and Free Exercise Clauses. In *Engel* v. *Vitale*, *supra* at 430-32, the Court said:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct government compulsion and is violated by the enactment of the laws which establish an official religion whether these laws operate directly to coerce nonobserving individuals or not. . . . The Establishment Clause thus stands as an expression that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand. . . .

In *Flast*, both Mr. Justice Stewart and Mr. Justice Fortas recognized the special importance of the purpose of the Establishment Clause in dealing with standing questions. *Flast* v. *Cohen*, *supra* at 114-15. This Court also has declared that "values enshrined in the First

Amendment plainly rank high 'in the scales of our national values.' " *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), 99 S.Ct. 1313, 1319. And it is basic that the First Amendment provisions prohibiting an abridgement of religious freedom are to be broadly interpreted. *Everson* v. *Board of Education*, 330 U.S. 1 (1947).

Respondents claim a particular concrete injury to a fundamental right, a right protected by the first guarantee in the Bill of Rights.[2] For example, Respondent Andrew Leigh Gunn noted "that when Government takes sides on matters of religion, it is taking a side against my religion . . . [a]nd thereafter is inhibiting my freedom of conscience by forcing me as a taxpayer and as a citizen to give support to someone else's religion." Gunn Deposition at 29-30.

Historically, as Justice Frankfurter explained, "[a] litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would

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[2] Professor Louis Jaffee argues that taxpayer-citizen suits are consistent with the concept of majority rule: "Where there is no statutory or common law basis for a taxpayer suit the problem itself is . . . a constitutional one. One might distinguish between cases in which . . . the citizen or taxpayer asserting the constitutional claim, though not immediately affected, is seen as a member of a class entitled to constitutional protection and . . . one which is not so situated. I confess the distinction is not so obvious as it may sound since it is arguable that all constitutional prescriptions are intended for the protection of that class of citizens which is at any one time disadvantaged by the failure to observe the constitutional requirement. . . . But there is, I believe, a sense in which the protections of the Bill of Rights differ [from other constitutional protections such as the presidential veto power and methods of amending the Constitution]." L. Jaffee, *The Citizen as Litigant In Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U.Pa.L.R. 1033, 1045 (1968).

create a right of action recognizable by the courts. . . . Or standing may be based on an interest created by the Constitution or a statute. . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 152 (1951) (concurring opinion) (citations omitted). The Establishment Clause obviously was intended to protect not merely taxpayers as such. It was designed to protect every citizen.

The Court of Appeals noted in its decision that "[a]s Chief Justice Marshall wrote long ago in *Marbury* v. *Madison* [1 Cr. (5 U.S.) 137 (1803)], ' "[t]he very existence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." ' 619 F.2d at 266. It further observed: "The constitutional 'injury in fact' complained of by the Plaintiffs here gives them a sufficient 'personal stake in the outcome' to assure a complete perspective of the issues involved." *Ibid.*

B. Respondents Have Standing Under The Administrative Procedure Act To Challenge This Transfer Of Property.

Respondents have a second basis for standing in this case. The Administrative Procedure Act, 5 U.S.C. §702 (1970), grants standing to challenge administrative action to any "person suffering legal wrong . . . or adversely affected or aggrieved" by it. *United States* v. *Students Challenging Regulatory Agency Procedure (SCRAP)*, 412 U.S. 669, 689, n. 14 (1973).

This Court has held and reaffirmed that under APA review the constitutional threshold requirement for standing is reduced to "actual injury redressable by the court." *Data Processing Service Organizations* v. *Camp*, *supra*; *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38-39 (1976).

In this case the Federal Property and Administrative Services Act seems clearly designed to prevent the public loss of the residual value of any surplus property. The statute clearly requires the governmental agencies to either obtain from purchasers the fair market value of any property disposed of or to obtain some constitutionally permissible benefit to the United States. Respondents as taxpayers and citizens under the APA are adversely affected or aggrieved by HEW's failure to obtain fair and constitutionally sufficient consideration for the sale of the property.

The courts repeatedly have held that what government is prohibited from doing directly, it cannot do indirectly. Otherwise "the Establishment Clause become[s] a mockery." *School District of Abington Township* v. *Schempp, supra* at 229-30 (Mr. Justice Douglas concurring).

Few today would seriously argue that government can make a direct appropriation of funds from the federal treasury for the purpose of setting up and furnishing a pervasively sectarian college. There is no practical difference or logical distinction as far as presentation of a case and the ability of a court to resolve an issue is concerned, between a plaintiff objecting to a grant of money or the grant of surplus, but valuable, real estate, buildings, and furnishings.

This Court in focusing upon the taxpayers' status in *Flast* quite naturally zeroed in on the Taxing and Spending Clause of the Constitution because in *Flast* that was the constitutional clause that was implicated. The Establishment Clause equally limits the power of Congress to dispose of property under Article IV, Section 3, Clause 2, of the Constitution. This concept clearly concerned the Court of Appeals in this case. It observed

that under Petitioner's view of standing, "Congress could transfer to a particular religious organization such national facilities as the Naval Observatory or the Army War College, secure in the knowledge that any citizen attempting to challenge such action under the Establishment Clause would not even be granted standing to make the claim." 619 F.2d at 266.[3]

A denial of standing in a sense is a decision that a particular constitutional provision does not protect one in the Respondents' position. K. Scott, *Standing In the Supreme Court — A Functional Analysis*, 86 Harv. L.R. 645, 687, n. 180 (1973).

The Respondents should have as much standing in attacking a grant under the exercise of congressional power under Article IV, Section 3, Clause 2, as plaintiffs in *Flast* under Article I, Section 8, Clause 1. The Government is parting with property just as surely under one clause as under the other. It depletes the Nation's capital assets whether the grant is one of a million dollar bills or a million dollars worth of land, bricks, mortar, and furnishings. The case is no less adversary in one case than the other, and one case is no less capable of judicial resolution. Taxpayers suffer equally in both situations.

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[3] If Petitioner and the Government are correct that no one, perhaps, has standing to challenge government acts under its Article IV, Section 3, Clause 1, powers, all types of gifts to churches might be possible without the benefit of judicial intervention. The government could conceivably give to pervasively sectarian institutions surplus electric power generated by the Tennessee Valley Authority; surplus real estate acquired through eminent domain powers; property, including money, obtained by the Government in the form of gifts; and even real estate obtained under treaties. The list is potentially endless.

C. Establishment Clause Issues Should Be Decided By The Judicial Branch.

Another question in this case involves the doctrine of the separation of powers and the appropriate forum to hear the Respondents' claim. Petitioner and the Government would leave Respondents' injury to the political process for redress.

The Government says that claims such as Respondents' must be vindicated in the legislative and executive branches. The Government advises that after more than thirty years the Department of Education is reviewing its procedures for contracting with church-related educational institutions for the sale of surplus property. The Government advises that during this review period, "plaintiffs may present their views to the Department of Education, and, if they are dissatisfied with the response, they may present their views both to their representatives in Congress and to the appropriate officials in the Executive Branch." The Government indicates "[t]he existence of a representative government responsible to the electorate, and the continuous scrutiny of government actions by the news media, are sufficient safeguards against hypothetical abuses. . . ." Government's Brief on Merits at 40-41.

The Government, however, fails to advise how the legislative or executive branch can adjudicate the issues in this specific case. The case here presented is not hypothetical. It involves a specific transfer of property to a specific pervasively sectarian school. The issues are joined between real, live adversaries with important and real questions of fact and law. Neither the legislative nor executive branch is empowered to void the grant and the contract between the Government and the Bible College. "The legislative function is inherently general rather

than particular and is not intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves." *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 222 n.10 (1974).

In *Lemon* v. *Kurtzman*, *supra* at 622-23, this Court observed:

> Ordinarily political debate and division, however vigorous or ever partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils which the First Amendment was intended to protect . . . . The potential divisiveness of such conflict is a threat to the normal political process . . . . It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government.

(Citations omitted.)

Establishment-Clause cases reach to the very core of our basic constitutional protections. It is the special role of the judiciary to protect that fundamental right and see that it is not derogated in the normal political processes.

In *Engel* v. *Vitale*, *supra* at 429-30, this Court acknowledged the anguish, hardship and bitter strife that can come when religious groups struggle to obtain the Government's stamp of approval. The Court observed that "[t]he Constitution was intended to avert a part of this danger by leaving the government of the country in the hands of the people rather than in the hands of any monarch. But this safeguard was not enough." The founders of our country were no more willing to place religious liberty within the influence of the ballot box

than they were to let these vital matters of personal conscience depend upon a succession of monarchs. They insisted it be specifically protected in the Bill of Rights.

Thus, in their insistence to relegate Establishment-Clause rights to the ballot box, to the halls of Congress, or to the bureaucratic maze of the federal government, Petitioner and the Government fail to comprehend what this Court declared in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943): "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."

Historically the Bill of Rights was conceived as a part of the checks and balances between our three branches of government. In a letter to James Madison on October 17, 1788, Thomas Jefferson objected to Madison's opinion that a Bill of Rights would be ineffective. Jefferson said Madison had omitted to mention "one [argument] which has great weight . . . , the legal check which [a Bill of Rights] puts into the hands of the judiciary." In a December 20, 1789, letter to Madison, Jefferson wrote: "I will now add what I do not like. First the omission of a bill of rights providing clearly and without aid of sophisms for religious freedom. . . ." 12 *The Papers of Thomas Jefferson* 438-42 (J.P. Boyd ed. 1958). Jefferson's letters probably led Madison to emphasize, when he presented his draft of the Bill of Rights to Congress, that the courts would enforce the limitations of the proposed amendments. B. Schwartz, 1 *The Bill of Rights: A Documentary History* 593 (1971).

D. Respondents Are Best Situated To Challenge This Property Transfer On Establishment Clause Grounds.

Courts are reluctant to let plaintiffs litigate issues implicating the rights of third parties who are in a better position to sharpen the issues because the holders of those rights may be bound by the doctrine of stare decisis. *Singleton* v. *Wulff*, 428 U.S. 106, 114 (1976).

Like any rule, however, this prudential rule should not be applied where its underlying justification is absent. *Id.* at 114-15. In *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), this Court considered the general rule that a party may not attack government action on the ground that it might infringe on some third party. It held that the general rule was outweighed by the need to protect fundamental rights in a situation in which it would be difficult for the persons whose rights are asserted to present their grievance before any court. *Id.* at 124-25.

This Court has held that an association may have standing solely as the representative of its members if it claims they have been injured in fact or are threatened with injury if the members themselves could have brought suit. So long as the nature of the suit does not require the individual participation of each of the members, the organization may be an appropriate representative of its members. *Warth* v. *Seldin*, *supra* at 511. In this case Americans United represents its members, including those who reside in Pennsylvania, where the property in question is located. Doerr Deposition at 27 and Binns Deposition at 20.

In addition Respondent Americans United has been recognized as having a national role in church-state litigation; as being one of three dominant groups litigating church-state issues; as helping impose "an im-

pressive degree of order and stability on church-state litigation;" and as being exclusively concerned with questions of church-state separation since its founding in 1947. F. Sorauf, *The Wall of Separation* 31-60 (1976).

In his concurring opinion in this case Judge Rosenn of the Third Circuit noted that "Americans United is likely to be the best available plaintiff. If they do not have standing, it is probable that the transfer, and other similar transfers . . . would be placed beyond judicial review. In respect to such actions, the Establishment Clause would be rendered virtually unenforceable." 619 F.2d at 268.

Individual Respondents are taxpayers and citizens entitled to protection of the Establishment Clause, and they are also practicing clergymen. Gunn Deposition at 5-10; Doerr Deposition at 5-6; Settembrini Deposition at 4-12; Binns Deposition at 4-18. As credentialed clergymen of their respective denominations, the individual Respondents find the Government action here challenged especially repugnant to their rights under the Religion Clause of the First Amendment.

Thus Respondent Americans United and the four individual Respondents have the unique attributes and purposes in the area of church-state affairs to litigate Establishment Clause issues. They possess the knowledge and resources to present sincerely and responsibly to the courts a vigorously argued case. *United States* v. *SCRAP*, *supra* at 699 (Mr. Justice Blackmun and Mr. Justice Brennan concurring.)

Respondents submit that the decision of the Third Circuit in this case is correct because to deny their standing denies relief to those seeking the intervention of the

only branch of government that historically has protected against and redressed violations of our treasured Bill of Rights.

To paraphrase Mr. Justice Blackmun, must our law of standing be so rigid and our procedural concepts so inflexible that we render ourselves helpless to redress claimed violations to our most basic and fundamental rights? *Sierra Club* v. *Morton*, 405 U.S. 727, 755 (1972) (Mr. Justice Blackmun dissenting). As Judge Rosenn in this case at the Third Circuit noted: "[T]he First Amendment, with its protections of fundamental rights, must be enforceable by the judicial branch of government, for it is by its very nature and terms designed to protect against possible abuse by the political branch." 619 F.2d at 266 (concurring opinion). Petitioner and the Government acknowledge that if these Respondents are not given standing, no one probably will have the right to obtain protection of the arm of government, the judiciary, which Jefferson envisioned to be the chief bulwark of the Bill of Rights.

The Court of Appeals quoted Mr. Justice Harlan for the proposition that " 'freedom from establishment is a right that inheres in every citizen, thus any citizen should be permitted to challenge any measure that conceivably involves establishment.' " *Id.* at 265, quoting Mr. Justice Harlan's dissent in *Flast* v. *Cohen*, *supra* at 114. As the court below stated, "[I]t may well be that the Establishment Clause should be enforceable at the demand of every citizen who claims injury to an interest protected thereby." *Id.* at 266.

And as Mr. Justice Fortas observed in *Flast* v. *Cohen*:

> In terms of the structure and basic philosophy of our constitutional government, it would be difficult

to point to any issue that has a more intimate, pervasive, and fundamental impact upon the life of the taxpayer — and upon the life of all citizens.

Perhaps the vital interest of a citizen in the establishment issue, without reference to his taxpayer's status, would be acceptable as a basis for this challenge. We need not decide this. But certainly, I believe, we must recognize that our principle of judicial scrutiny of legislative acts which raise important constitutional questions requires that the issue here presented — the separation of state and church — which the Founding Fathers regarded as fundamental to our constitutional system — should be subjected to judicial testing. This is not a question which we, if we are to be faithful to our trust, should consign to limbo, unacknowledged, unresolved, and undecided.

392 U.S. 115-116 (concurring opinion).

CONCLUSION

This Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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